

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

DAYMOND HAYWOOD,  
Plaintiff,

vs.

C/O FRI, *et al.*,  
Defendants.

Case No. 1:18-cv-361

Black, J.  
Bowman, M.J.

**ORDER AND REPORT  
AND RECOMMENDATION**

Plaintiff, a prisoner at the Southern Ohio Correctional Facility (SOCF), filed a pro se civil rights complaint in this Court against defendants Warden Ron Erdos, RN Janis Reiner, C/O Fri, C/O Dunlap, Deputy Warden Cool, Lieutenant Kaut, Lieutenant Esham and Sergeant Payne. (Doc. 1, Complaint at PageID 12). By separate Order, plaintiff has been granted leave to proceed *in forma pauperis*. This matter is before the Court for a *sua sponte* review of the complaint to determine whether the complaint or any portion of it, should be dismissed because it is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. *See* Prison Litigation Reform Act of 1995 § 804, 28 U.S.C. § 1915(e)(2)(B); § 805, 28 U.S.C. § 1915A(b).

In enacting the original *in forma pauperis* statute, Congress recognized that a “litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.” *Denton v. Hernandez*, 504 U.S. 25, 31 (1992) (quoting *Neitzke v. Williams*, 490 U.S. 319, 324 (1989)). To prevent such abusive litigation, Congress has authorized federal courts to dismiss an *in forma pauperis* complaint if they are satisfied that the action is frivolous or malicious. *Id.*; *see also* 28 U.S.C. §§ 1915(e)(2)(B)(i) and 1915A(b)(1). A complaint may be dismissed as frivolous when the plaintiff cannot make any claim with a rational or arguable basis in fact or law. *Neitzke v.*

*Williams*, 490 U.S. 319, 328-29 (1989); *see also Lawler v. Marshall*, 898 F.2d 1196, 1198 (6th Cir. 1990). An action has no arguable legal basis when the defendant is immune from suit or when plaintiff claims a violation of a legal interest which clearly does not exist. *Neitzke*, 490 U.S. at 327. An action has no arguable factual basis when the allegations are delusional or rise to the level of the irrational or “wholly incredible.” *Denton*, 504 U.S. at 32; *Lawler*, 898 F.2d at 1199. The Court need not accept as true factual allegations that are “fantastic or delusional” in reviewing a complaint for frivolousness. *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010) (quoting *Neitzke*, 490 U.S. at 328).

Congress also has authorized the *sua sponte* dismissal of complaints that fail to state a claim upon which relief may be granted. 28 U.S.C. §§ 1915 (e)(2)(B)(ii) and 1915A(b)(1). A complaint filed by a *pro se* plaintiff must be “liberally construed” and “held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). By the same token, however, the complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Hill*, 630 F.3d at 470-71 (“dismissal standard articulated in *Iqbal* and *Twombly* governs dismissals for failure to state a claim” under §§ 1915A(b)(1) and 1915(e)(2)(B)(ii)).

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). The Court must accept all well-pleaded factual allegations as true, but need not “accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286

(1986)). Although a complaint need not contain “detailed factual allegations,” it must provide “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.* at 557. The complaint must “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Erickson*, 551 U.S. at 93 (citations omitted).

In the complaint, plaintiff first alleges that he was denied mental health treatment. Plaintiff alleges that on January 1, 2018 he approached defendants C/O Dunlap and C/O Fri to notify them of his suicidal feelings. (Doc. 1, Complaint at PageID 13). Plaintiff alleges that he reminded Dunlap and Fri multiple times that he is a mental health patient. (*Id.*). Nevertheless, plaintiff claims that they ignored his requests for assistance. (*Id.*). Plaintiff was subsequently stripped and escorted to his cell, where he proceeded to hang himself. (*Id.*). According to plaintiff, Dunlap and Fri were rushed to his cell where they cut plaintiff down and cuffed him from behind. (*Id.*).

Plaintiff alleges that defendants Dunlap, Fri, and Lieutenant Kaut subsequently used excessive force against him. (*Id.*). Plaintiff claims that once Dunlap and Fri came to his cell, they handcuffed him, bent his wrist upward, and tried to bend his pinky finger. (*Id.*). After plaintiff explained that he would write up Dunlap and Fri’s abuse, plaintiff alleges that defendant Kaut told him to “shut up” and “haled [him] to the floor” in front of defendant Warden Cool. (*Id.* at PageID 14). Defendant Kaut then struck plaintiff in the head with his elbow and proceeded to “use excessive force on [his] wrist all the to the infirmary (sic).” (*Id.* at PageID 14). Plaintiff further alleges that Cool was present during the incident and failed to intervene or

otherwise protect him. According to plaintiff, he nearly fainted and, consequently, other officers had to carry him up to the infirmary exam room. (*Id.*).

Once in the infirmary, plaintiff alleges that Kaut and defendant Lieutenant Esham punched plaintiff in the head and slapped his face multiple times. (*Id.*). He further alleges that multiple officers, as well as defendant RN Janis Reiner, were present and witnessed the assault. Plaintiff claims that he was put on suicide watch following the incident, but was otherwise denied medical treatment for his wrists, which he claims were bleeding, swollen, and limp/numb. (*Id.* at PageID 14–15).

Plaintiff next claims that he was escorted “upstairs to D1 of the Infirmary” by Kaut, Esham, and another officer. (*Id.* at PageID 15). He claims he was ordered to face the back wall of the elevator. After complying with the order, plaintiff alleges that Kaut struck him in the back with a PR-24 stick. (*Id.*). According to plaintiff, he turned around and Kaut jabbed him several more times in the ribs with the PR-24 stick. (*Id.*). Plaintiff claims that Kaut stated that he wished plaintiff would have killed himself and referred to him using a racial slur. (*Id.*). Finally, as plaintiff was exiting the elevator, he claims that defendant Kaut punched him in the face and continued to threaten him. (*Id.*).

As relief, plaintiff seeks monetary damages and injunctive relief. (*Id.* at PageID 16).

At this stage in the proceedings, without the benefit of briefing by the parties to this action, the undersigned concludes that plaintiff may proceed with his Eighth Amendment claims against defendants Dunlap, Fri, and Reiner, based on his allegations that these defendants denied him medical treatment. Plaintiff may also proceed with his excessive force and/or failure to protect claims against defendants Dunlap, Fri, Kaut, Esham, and Cool. However, plaintiff’s remaining claims should be dismissed. *See* 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b).

As an initial matter, plaintiff includes no factual allegations against defendants Warden Erdos and Sergeant Payne. The complaint should therefore be dismissed as to these defendants.

The complaint should also be dismissed as to all defendants in their official capacities to the extent that plaintiff seeks money damages. Absent an express waiver, a state is immune from damage suits under the Eleventh Amendment. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139 (1993); *Edelman v. Jordan*, 415 U.S. 651 (1974). The State of Ohio has not constitutionally nor statutorily waived its Eleventh Amendment immunity in the federal courts. *See Johns v. Supreme Court of Ohio*, 753 F.2d 524 (6th Cir. 1985); *State of Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449 (6th Cir. 1982). The Eleventh Amendment bar extends to actions where the state is not a named party, but where the action is essentially one for the recovery of money from the state. *Edelman*, 415 U.S. at 663; *Ford Motor Company v. Dept. of Treasury*, 323 U.S. 459, 464 (1945). A suit against defendants in their official capacities would, in reality, be a way of pleading the action against the entity of which defendants are agents. *Monell*, 436 U.S. at 690. Thus, actions against state officials in their official capacities are included in this bar. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). *See also Colvin v. Caruso*, 605 F.3d 282, 289 (6th Cir. 2010) (citing *Cady v. Arenac Co.*, 574 F.3d 334, 344 (6th Cir. 2009) (“[A]n official-capacity suit against a state official is deemed to be a suit against the state and is thus barred by the Eleventh Amendment, absent a waiver.” (citation and ellipsis omitted))). Therefore, all of the named defendants are immune from suit in their official capacities to the extent that plaintiff seeks monetary damages.

Finally, to the extent that plaintiff may seek to hold defendants liable for the use of threats, racial slurs, or other insults he has failed to state a viable claim under § 1983, which

requires a showing of a deprivation of “a right secured by the United States Constitution or a federal statute.” *See Spadafore v. Gardner*, 330 F.3d 849, 852 (6th Cir. 2003). It is well-settled that “[v]erbal harassment or idle threats by a state actor do not create a constitutional violation and are insufficient to support a section 1983 claim for relief.” *Wingo v. Tennessee Dep’t of Corr.*, 499 F. App’x 453, 455 (6th Cir. 2012) (per curiam) (citing *Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987)); *see also Chilcott v. Erie Cnty. Domestic Relations*, 283 F. App’x 8, 11 (3rd Cir. 2008) (and Sixth, Fifth and Tenth Circuit cases cited therein). Additionally, while prison officials should not use degrading or racist language when interacting with inmates, the use of such language does not rise to the level of a constitutional violation. *See Hursey v. Anderson*, No. 16-1146, 2017 WL 3528206, at \*4 (6th Cir. Mar. 31, 2017). A prison official’s use of racial slurs, “although unprofessional and reprehensible, does not rise to the level of constitutional magnitude” and is insufficient to support a constitutional claim for relief. *Jones Bey v. Johnson*, 248 F. App’x 675, 677-78 (6th Cir. 2007) (citing *Torres v. Oakland County*, 758 F.2d 147, 152 (6th Cir. 1985)); *see also Ivey*, 832 F.2d at 954. *Cf. Johnson v. Unknown Dellatifa*, 357 F.3d 539, 545-46 (6th Cir. 2004).

Accordingly, in sum, plaintiff may proceed with his Eighth Amendment denial of medical care against defendants Dunlap, Fri, and Reiner as well as his excessive force and/or failure to protect claims against defendants Dunlap, Fri, Kaut, Esham, and Cool. Having found that plaintiff’s remaining claims fail to state a claim upon which relief may be granted, these claims should be dismissed. *See* 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b).

**IT IS THEREFORE RECOMMENDED THAT:**

The complaint be **DISMISSED with prejudice** pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1), with the exception of plaintiff's Eighth Amendment claims against defendants Dunlap, Fri, Reiner, Kaut, Esham, and Cool.

**IT IS THEREFORE ORDERED THAT:**

1. The United States Marshal shall serve a copy of the complaint, summons, the Order granting plaintiff *in forma pauperis* status, and this Order and Report and Recommendation upon defendants Dunlap, Fri, Reiner, Kaut, Esham, and Cool as directed by plaintiff, with costs of service to be advanced by the United States.

2. Plaintiff shall serve upon defendants or, if appearance has been entered by counsel, upon defendants' attorney, a copy of every further pleading or other document submitted for consideration by the Court. Plaintiff shall include with the original paper to be filed with the Clerk of Court a certificate stating the date a true and correct copy of any document was mailed to defendants or defendants' counsel. Any paper received by a district judge or magistrate judge which has not been filed with the Clerk or which fails to include a certificate of service will be disregarded by the Court.

3. Plaintiff shall inform the Court promptly of any changes in his address which may occur during the pendency of this lawsuit.

s/ Stephanie K. Bowman  
Stephanie K. Bowman  
United States Magistrate Judge

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**NOTICE**

Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 DAYS** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).